

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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MICHAEL HALLMARK,

Plaintiff,

vs.

COHEN & SLAMOWITZ, LLP, and  
MIDLAND FUNDING LLC d/b/a  
MIDLAND FUNDING OF DELAWARE LLC

Defendants.

**DEFENDANT COHEN &  
SLAMOWITZ'S SECOND  
SUPPLEMENTAL RESPONSE TO  
PLAINTIFF'S DISCOVERY  
DEMANDS, INTERROGATORIES  
AND REQUEST FOR PRODUCTION  
OF DOCUMENTS**

Case No.: 11-CV-0842S(F)

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COHEN & SLAMOWITZ, LLP, by and through its attorneys, Smith, Sovik, Kendrick & Sugnet, P.C., hereby provides these Second Supplemental Responses to plaintiff's First Set of Discovery Demands and Request for Production of Documents as follows:

**GENERAL OBJECTIONS**

By responding to these demands, defendant does not concede the materiality of the subject to which it refers. Defendant's responses are made expressly subject to, and without waiving or intending to waive, any questions or objections as to the competency, relevance, materiality, privilege or admissibility as evidence or for any other purpose, of any of the documents or information produced, or of the subject matter thereof, in any proceeding including the trial or any subsequent proceeding.

Defendant objects to the extent that plaintiff demands documents and/or information which are protected by the attorney-client or work-product privilege, or which constitute material prepared for litigation purposes.

Inadvertent production of any document or information which is privileged, was prepared in anticipation of litigation, or is otherwise immune from discovery, shall not constitute a waiver of any privilege or of another ground for objecting to discovery with respect to such document or information or the information contained in any document or of defendant's right to object to the use of any such document or the information contained therein during any proceeding in this litigation or otherwise. Defendant also objects in the entirety to any request for documents that is not limited in time.

Defendant objects in the entirety to any request for information which is not in its possession, custody or control.

Defendant is continuing to search for information responsive to plaintiff's demands and therefore reserves the right to supplement this response to each demand with additional information if and when such information becomes available to defendant's counsel. Defendant reserves the right to object to the future disclosure of any such information.

Defendant reserves the right to make any further applicable objection, whether or not said objection is delineated above. The above objections in no way affects defendant's right to make applicable objections as the course of this matter progresses.

1. Plaintiff is a person and citizen of New York who resides in Erie County, New York.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

2. Plaintiff is a consumer as defined by the FDCPA, 15 U.S.C. § 1692a(3).

ANSWER: Admits.

3. Defendant Midland is engaged in the collection of debts from persons using the mail and/or telephone.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

4. Defendant Midland regularly attempts to collect consumer debts alleged to be due to another.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

5. Defendant Midland was and is a "debt collector" as defined by the FDCPA, 15 U.S.C. § 1692a(6).

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

6. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 40 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

7. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 100 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

8. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 300 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

9. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 500 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were

mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

10. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 700 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

11. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 1,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

12. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 1,500 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

13. Defendant C&S sent letters in a form substantially similar or materially identical to Exhibit A to these discovery demands to 2,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant objects to this request as it is vague, ambiguous and overbroad and is an improper request in its present form. Notwithstanding this and other objections, defendant admits that approximately 38,325 letters in a similar format were mailed during the timeframe noted above. In each instance, the letter was sent out before a Summons and Complaint was filed.

14. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 40 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as

they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

15. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 100 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

16. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received

by the Court Clerk, to 300 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

17. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 500 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and

Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

18. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 700 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

19. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 1,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

20. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 1,500 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen

& Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

21. Defendant C&S sent letters demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 2,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors and filing of Summons and Complaints. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. Defendant sent out 38,325 such letters before a Summons and Complaint had been filed.

22. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 40 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk cashed a check for a filing fee. Notwithstanding this and other objections, defendant states that it can only report information contained within its own records as they relate to certain correspondence sent to debtors. Based upon this information, defendant states that such letters are sent with the fee included only after the check for the filing fee had been cut by defendant, Cohen & Slamowitz. There is no way for Cohen & Slamowitz to determine when the Clerk cashed the check. In that situation, approximately 17,475 letters were sent out, before the Summons and Complaints were filed.

23. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 100 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the

time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

24. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 300 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

25. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 500 or more consumers

with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

26. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 700 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular

check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

27. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 1,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

28. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check

for the City Court filing fee was received by the Court Clerk, to 1,500 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections, defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

29. Defendant C&S sent letters, regarding debts allegedly owed to Midland, demanding fees for filing a summons and complaint with a City Court, before the check for the City Court filing fee was received by the Court Clerk, to 2,000 or more consumers with New York State addresses during the period from March 9, 2011 through March 9, 2012.

ANSWER: Defendant denies information sufficient to respond to this request. Defendant cannot state with particularity when any specific letter was specifically placed in the custody of the U.S. Postal Service, nor can defendant state when any given court clerk received a check for a filing fee. Notwithstanding this and other objections,

defendant states that it has limited information concerning when it was that any particular check was cashed by a New York State Court Clerk. However, upon information and belief, approximately 17,475 such letters were sent out on Midland accounts during the time frame noted above. As noted in the above responses, such letters are sent only after the check for the filing fee has been cut by defendant, Cohen & Slamowitz. The letters were sent before the Summons and Complaints were filed.

30. Defendant C&S's net worth is greater than \$1,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant states, upon information and belief, that C&S's net worth is less than \$1,000.00 as the firm has no retained earnings or real property.

31. Defendant C&S's net worth is greater than \$5,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

32. Defendant C&S's net worth is greater than \$10,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

33. Defendant C&S's net worth is greater than \$25,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

34. Defendant C&S's net worth is greater than \$50,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

35. Defendant C&S's net worth is greater than \$75,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

36. Defendant C&S's net worth is greater than \$100,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

37. Defendant C&S's net worth is greater than \$200,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

38. Defendant C&S's net worth is greater than \$300,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

39. Defendant C&S's net worth is greater than \$400,000.00.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

40. Defendant C&S's net worth is greater than \$500,000.00

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

41. Defendant C&S's net worth is greater than \$1 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

42. Defendant C&S's net worth is greater than \$5 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

43. Defendant C&S's net worth is greater than \$10 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

44. Defendant C&S's net worth is greater than \$15 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

45. Defendant C&S's net worth is greater than \$20 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

46. Defendant C&S's net worth is greater than \$25 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

47. Defendant C&S's net worth is greater than \$30 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

48. Defendant C&S's net worth is greater than \$35 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

49. Defendant C&S's net worth is greater than \$40 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

50. Defendant C&S's net worth is greater than \$45 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

51. Defendant C&S's net worth is greater than \$50 million.

ANSWER: Defendant objects as this is an improper request and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Defendant further objects as no class has yet been certified. Notwithstanding these objections, defendant denies. See response to "30" above.

52. Defendant Midland's net worth is greater than \$1,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

53. Defendant Midland's net worth is greater than \$5,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

54. Defendant Midland's net worth is greater than \$10,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

55. Defendant Midland's net worth is greater than \$25,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

56. Defendant Midland's net worth is greater than \$50,000.00-

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

57. Defendant Midland's net worth is greater than \$75,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

58. Defendant Midland's net worth is greater than \$100,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

59. Defendant Midland's net worth is greater than \$200,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

60. Defendant Midland's net worth is greater than \$300,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

61. Defendant Midland's net worth is greater than \$400,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

62. Defendant Midland's net worth is greater than \$500,000.00.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

63. Defendant Midland's net worth is greater than \$1 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

64. Defendant Midland's net worth is greater than \$5 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

65. Defendant Midland's net worth is greater than \$10 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

66. Defendant Midland's net worth is greater than \$15 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

67. Defendant Midland's net worth is greater than \$20 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

68. Defendant Midland's net worth is greater than \$25 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

69. Defendant Midland's net worth is greater than \$30 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

70. Defendant Midland's net worth is greater than \$35 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

71. Defendant Midland's net worth is greater than \$40 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

72. Defendant Midland's net worth is greater than \$45 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

73. Defendant Midland's net worth is greater than \$50 million.

ANSWER: Defendant denies knowledge or information sufficient to provide a response.

74. Defendant C&S sent the letter attached to these discovery demands as Exhibit A to Plaintiff on or about August 17, 2011.

ANSWER: Defendant objects as the request is vague and ambiguous. Notwithstanding this and other objections, defendant admits.

75. In the letter attached as Exhibit A to these discovery demands, Defendant C&S demanded a fee for filing a summons and complaint with the City Court of Buffalo in the amount of \$140.00, as part of the total amount demanded of \$1,982.89.

ANSWER: Defendant admits.

76. On August 25, 2012, Defendant filed a summons and complaint in the City Court of Buffalo in the case entitled Midland Funding LLC DBA in New York as Midland Funding of Delaware LLC bearing Index No. 8173-2011.

ANSWER: Defendant objects as the request is vague and ambiguous. Notwithstanding this and other objections, defendant denies that it filed the Summons and Complaint on August 25, 2012. The Summons & Complaint was stamped filed on August 25, 2011. Defendant admits that it presented the Clerk with the Summons and Complaint for filing on or about August 25, 2011.

77. A true, accurate, genuine, and complete copy of the summons and complaint filed with the City Court of Buffalo in the case entitled Midland Funding LLC DBA in New York as Midland Funding of Delaware LLC, Index No. 8173-201, is attached to these discovery demands as Exhibit B.

ANSWER: Defendant objects as the request is vague and ambiguous. Notwithstanding this and other objections, defendant admits.

78. On August 24, 2011, Defendant paid a filing fee to the City Court of Buffalo in the amount of \$140.00, in the case entitled Midland Funding LLC DBA in New York as Midland Funding of Delaware LLC, Index No. 8173-2011

ANSWER: Defendant objects as the request is vague and ambiguous. Notwithstanding this and other objections, defendant denies. The check for the filing fee was cut on August 15, 2011 and as such was an expense incurred. Defendant cannot state when the clerk cashed the check.

## **II. Interrogatories**

1. State the name, address, title, and job description of each officer, director, partner, shareholder, and employer of Defendants who authorized, approved, or created the form of letter attached as Exhibit A to these discovery demands.

RESPONSE: David A. Cohen, Esq., Partner.

2. State the number, names and addresses of persons with New York addresses to which Defendants sent letters substantially similar or materially identical to the letter attached to these discovery demands as Exhibit A from March 9, 2011 through March 9, 2012.

RESPONSE: Defendant objects as the demand is vague, ambiguous and overbroad. Defendant states that it cannot determine with particularity which debtors/consumers may have received such correspondence. Defendant objects s the demand seeks private, confidential information concerning debtors/consumers. Release of this private information concerning debtors may very well violate the F.D.C.P.A. or other statutes and subject defendant to liability. Notwithstanding these and other objections, defendant states that the names and addresses of debtors receiving such letters has been provided and is attached.

3. State the number, names and addresses of persons with New York addresses to whom Defendants sent letters substantially similar or materially identical to the letter attached to these discovery demands as Exhibit A from March 9, 2011 through March 9, 2012, in which fees for filing a summons and complaint with a City Court were demanded.

RESPONSE: Defendant objects as the demand is vague, ambiguous and overbroad. Defendant states that it cannot determine with particularity which debtors/consumers may have received such correspondence. Defendant objects s the demand seeks private, confidential information concerning debtors/consumers. Release

of this private information concerning debtors may very well violate the F.D.C.P.A. or other statutes and subject defendant to liability. Notwithstanding these and other objections, defendant states that the names and addresses of debtors receiving such letters has been provided and is attached.

4. State the number, names and addresses of persons with New York addresses to whom Defendants sent letters substantially similar or materially identical to the letter attached to these discovery demands as Exhibit A from March 9, 2011 through March 9, 2012, in which fees for filing a summons and complaint with a City Court were demanded before the filing fees were received by the Court Clerk.

RESPONSE: Defendant objects as the demand is vague, ambiguous and overbroad. Defendant states that it cannot determine with particularity which debtors/consumers may have received such correspondence. Defendant objects s the demand seeks private, confidential information concerning debtors/consumers. Release of this private information concerning debtors may very well violate the F.D.C.P.A. or other statutes and subject defendant to liability. Notwithstanding these and other objections, defendant states that the names and addresses of debtors receiving such letters have been provided.

5. State the number, names and addresses of persons with New York addresses to whom Defendants sent letters substantially similar or materially identical to the letter attached to these discovery demands as Exhibit A from March 9, 2011 through March 9, 2012, in which fees for filing a summons and complaint with a City Court were

demanded before the filing fees were received by the Court Clerk, and who paid the filing fees demanded.

RESPONSE: Defendant objects as the demand is vague, ambiguous and overbroad. Defendant states that it cannot determine with particularity which debtors/consumers may have received such correspondence. Defendant objects to the demand seeks private, confidential information concerning debtors/consumers. Release of this private information concerning debtors may very well violate the F.D.C.P.A. or other statutes and subject defendant to liability. Notwithstanding these and other objections, defendant states that the names and addresses of debtors receiving such letters have been provided.

6. Describe, step-by-step, the process which resulted in the Letter being transmitted to Plaintiff, beginning with the date and method of transmission of debtor information to Defendants, including: computer tapes or other media delivered (when, by whom, where and to whom); content of computer tape or media; data input (where and by whom); computer entry or other means of directing transmission letters (where and by whom entry made), letter with debtor information printed (from where and by whom); letter with debtor information mailed (from where and by whom), computer tapes or media returned (on what occasion, when, by whom and to whom).

RESPONSE: Defendant objects to the demand as vague, ambiguous and overbroad and cannot be responded to in its present form.

7. Describe, step-by-step, the process by which the Defendants determined the filing fee charged by New York State's City Courts in the Letter and added the filing fee to the total amount demanded in the Letter.

RESPONSE: Defendant objects. The process for filing a summons and complaint in any given court is set forth in that Court's statutes, rules and/or regulations. The filing fee is set forth in the Court rules.

8. State the net worth of each Defendant and, describe in detail, how it was computed.

RESPONSE: Defendant objects as the request is vague, ambiguous and overbroad. Defendant further objects as the demand calls for irrelevant information. Defendant cannot respond to the request as it pertains to co-defendant. Defendant refers plaintiff to its responses provided in requests 30 through 51 above. Notwithstanding this and other objections, defendant states upon information and belief, that its net worth is less than \$1,000.00 and defendant's calculation is based on the following formula: assets minus liabilities equals equity (net worth). Defendant presently has no retained earnings and owns no real property. Defendant is presently operating with an outstanding loan/debt.

9. Describe the contractual relationship between C&S and Midland.

RESPONSE: Defendant C&S has an attorney-client relationship with co-defendant, Midland.

10. Describe all communications between C&S and Midland concerning Plaintiff.

RESPONSE: Defendant objects as such communications are protected by the attorney-client privilege. Notwithstanding this request, defendant is assigned the case for collection by Midland as reflected in the collection file attached. Defendant updates its collection file periodically to reflect the progress of its efforts.

11. Describe all communications between Defendants and Plaintiff, including date; participation, subject matter, regular or certified mail, telephone conversation or message, etc.

RESPONSE: Defendant objects to the demand as vague, ambiguous and overly broad. Notwithstanding this objection, defendant states, upon information and belief, that communication between plaintiff and defendant would consist of correspondence previously disclosed. Notwithstanding this and other objections, the defendant's collection file has been attached to these responses.

12. Describe Defendants' maintenance of procedures reasonably adapted to avoid violation of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*

RESPONSE: Defendant objects to the demand as seeking information not relevant to the instant litigation. Notwithstanding this and other objections, defendant states that it maintains copies of the F.D.C.P.A. at its offices for reference and trains its employees on the proper manner to collect on debts. Copies of the cover pages of the materials utilized have been provided. Defendant engages in periodic training and retraining of its employees on debt collection and compliance with the FDCPA. **Defendant has attached additional material.**

13. If claiming that any noncompliance with the Fair Debt Collection Practices Act was the result of a bona fide error, describe all of the measures that you took to prevent or avoid the occurrence of this violation, including the dates that such measures were undertaken.

RESPONSE: See 12.

14. Identify all individuals having knowledge of the measures described in response to Interrogatory Number 13, and describe their involvement in those measures.

RESPONSE: Leandre John, Esq. and David Cohen, Esq. supervise the defendant's compliance with the FDCPA.

15. Describe any insurance covering Defendants for the conduct alleged in the Complaint, including policy limits.

RESPONSE: Defendant is insured by AIX Specialty Insurance Company, a member of the Hanover Insurance Group through a claims-made policy, number 10NY20007500201-SL PL, with limits of \$3,000,000/\$5,000,000 for a policy period 12/31/10 through 12/31/11.

16. Fully describe the computer hardware, software and storage media including, but not limited to, name, type, model or version number, location and manufacturer which Defendants use to store data for both active and inactive accounts concerning class members.

RESPONSE: Defendant objects as the demand calls for information that is confidential and proprietary in nature. Attached is a Confidentiality Stipulation. Defendant will provide a further response upon execution of the same.

17. Identify all persons, including former and current employees, involved in Defendants' efforts to collect on Plaintiffs account.

RESPONSE: Ed Aiken; John Lisa; Robert Shalofski; Veronica Aycock; Nicole Santana; Myriam Butler; Neal Traina; John Saslona; David Cohen. Of these, two are no longer employed. Ed Aiken, 194-06, 122<sup>nd</sup> Avenue, Springfield Gardens, New York 11413, and John Saslona, P.O. Box 719, Lindenhurst, New York 11757. The remainder are still employees of defendant.

18. Identify each person Defendants expect to call as an expert witness at trial and state: (1) the subject matter on which the expert is expected to testify, (2) the substance of the facts and opinions to which the expert is expected to testify, (3) a summary of the grounds for each opinion, and (4) the expert's qualifications.

RESPONSE: Defendant has not retained an expert at this time. Defendant reserves the right to supplement this response prior to the close of discovery.

19. Describe all real property owned by C&S and/or Midland between January 1, 2007 and the date of responding to these interrogatories and identify all appraisals of the value of the property.

RESPONSE: Defendant C&S owns no real property. Defendant has no knowledge of the assets of co-defendant.

20. Identify each asset owned by C&S and/or Midland between January 1, 2007 and the responding date to these interrogatories other than real property identified in response to Interrogatory Number 15, including assets jointly held, and including, without limitation, deposit accounts, investment accounts, retirement accounts, securities,

motor vehicles, furnishings and fixtures, office equipment, computers, and accounts receivable.

RESPONSE: Defendant owns no assets. Defendant has no knowledge of the assets of co-defendant.

21. For each asset identified in response to Interrogatory Numbers 19 or 20, state the approximate value.

RESPONSE: Not applicable. See above.

22. Identify and state the approximate amount of all of C&S's and/or Midland's debts, including debts jointly owed, and specifically identify all such debts that are owed to a shareholder, officer or director of the company.

RESPONSE: Defendant objects as the demand seeks confidential information. Defendant further objects as the demand seeks irrelevant information as no class has been certified.

23. Specify each asset or liability identified in response to Interrogatory Numbers 19, 20, 21 or 22 that is jointly held or owed, state the circumstances under which it came to be jointly held or owed, identify each individual with whom the asset or liability is jointly held or owed, and state the relative percentage ownership or responsibility each entity has with respect to such asset or liability.

RESPONSE: Not applicable. See above responses.

24. If C&S and/or Midland transferred any asset identified in response to Interrogatory Numbers 19, 20, 21 or 22, state the circumstances surrounding the transfer and any consideration received, and identify all documents concerning the transfer.

RESPONSE: Not applicable. See above responses.

25. Identify any certified public accountant, auditor, or other professional who has prepared tax returns or financial statements on your behalf on or after January 1, 2007.

RESPONSE: Marcum Accountants Advisors, 10 Melville Road, Melville, New York 11747.

### **Requests for Production of Documents**

Plaintiff requests that Defendants C&S and Midland produce the following documents at The Law Offices of Kenneth R. Hiller, PLLC, 6000 North Bailey Ave, Suite 1A, Amherst, NY 14226. All documents must be Bates-stamped. These discovery demands are continuing so as to require supplementary answers if you obtain further information between the time answers are served and the time of trial. Copies will be made and the originals returned unless other arrangements are made. Please see above for instructions and definitions. If there are no such documents, please so state. If there are such documents, please list appended documents responsive to each request.

1. All agreements between C&S and Midland.

RESPONSE: Defendant objects as this demand calls for information that is protected by attorney-client privilege.

2. All documents concerning the authority granted to C&S by Midland regarding the collection of Plaintiffs alleged debt.

RESPONSE: Defendant objects as this demand calls for information that is protected by attorney-client privilege.



6. Counsel for C&S did not serve the unaudited financial statements attached to the supplemental declaration on my office until 3:23 p.m. on May 9, a little more than an hour before counsel's email to chambers purporting to file the supplemental declaration "under seal." A copy of the email I received from Mr. Sayles at 3:23 p.m. is attached as Exhibit A.

8. I had spoken with Mr. Sayles by telephone, concerning a different discovery matter, approximately one hour before he served the unaudited financial statements on me by email. While Mr. Sayles did indicate that he was planning to serve discovery materials on my office later that day, he did not explain what these materials would be. Nor did he express his intention to file a supplemental declaration in support of C&S's pending motion for reconsideration.

2

C&S's motion for reconsideration, Plaintiff also requests an extension of two weeks to respond to C&S's motion.

10. In support of Plaintiff's motion, I am attaching as Exhibit C copies of the relevant pages from the transcript of oral argument held on April 2, 2014, in Buffalo, New York before the Honorable Leslie G. Foschio. These are the pages referred to in the accompanying memorandum.

Dated: New York, New York  
May 12, 2014

/s/ Brian L. Bromberg  
Brian L. Bromberg



## Brian L. Bromberg

---

**From:** Andrew C. Sayles <ASayles@connellfoley.com>  
**Sent:** Friday, May 09, 2014 3:23 PM  
**To:** brian@bromberglawoffice.com  
**Cc:** thomas.leghorn@wilsonelser.com; joseph.francoeur@wilsonelser.com; 'Seth Andrews' (sandrews@kennethhiller.com); 'Ken Hiller' (khiller@kennethhiller.com); jonathan@bromberglawoffice.com  
**Subject:** Hallmark v. Cohen & Slamowitz, et al  
**Attachments:** Hallmark\_letter serving C&S financials\_subject to confidentiality order.PDF; 2011\_C&S consolidated.pdf; 2011\_C&S Only.pdf; 2012\_C&S consolidated.pdf; 2012\_C&S only.pdf

Brian,

Please see the attached letter and attachments producing financial statements on behalf of Cohen & Slamowitz subject to the Stipulation of Confidentiality ordered by the Court on May 8 and previously executed among counsel.

Thank you,  
Andrew

**Andrew C. Sayles**  
Partner  
Connell Foley LLP  
85 Livingston Avenue  
Roseland, NJ 07068  
Office: (973) 535-0500  
Fax: (973) 535-9217  
[asayles@connellfoley.com](mailto:asayles@connellfoley.com)  
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# Exhibit B



# Exhibit C

1 document requests again, please. We can see those at 73-1  
2 starting at page 33?

3 MR. BROMBERG: Yes.

4 THE COURT: Now, couple of preliminary questions.  
5 Assuming that the case survives summary judgment as to  
6 liability and I'm just speaking just -- I don't have non-  
7 dispositive -- dispositive referral authority. In fact, that  
8 really brings up a point about that motion to strike. That  
9 may have to be refiled in front of Judge Skretny.

10 MR. SAYLES: Incidentally, Your Honor I was not under  
11 the assumption that that was being heard today. I don't  
12 believe Mr. Leghorn was, either. Obviously, we'd be prepared  
13 to discuss it, if it is.

14 THE COURT: What, you didn't think --

15 MR. SAYLES: The motion to strike.

16 THE COURT: Oh. Only -- not really.

17 MR. SAYLES: Okay. We didn't think it was being  
18 heard today.

19 THE COURT: No, don't worry about it, but I'm just,  
20 you know, filling in gaps here. Okay.

21 MR. SAYLES: Okay.

22 THE COURT: Assume for the sake of discussion that  
23 there's a motion after we complete discovery, which is what  
24 we're here for, especially since the 2nd Circuit has denied  
25 the appeal as I told you they would or told your predecessor

1 they would. Mr. Leghorn would want to hear this question.  
2 Who has the burden at trial to establish or disestablish the  
3 defendant's net worth as being negative net worth?

4 MR. BROMBERG: I believe it would be the defendant's  
5 obligation to show that they have some kind of cap less than  
6 the \$500,000 cap because it would be -- the general rule is --

7 THE COURT: And you know that because you've read the  
8 Harris vs. D. Scott Carruthers case, right, which cited your  
9 favorite case, right Mr. Bromberg?

10 MR. BROMBERG: It's been a while since I read the  
11 Harris case, but --

12 THE COURT: Well, I mean, the Harris, case 270 F.R.D.  
13 446 at page 454 says quite thoroughly that in regard to an  
14 FDCPA class certification motion, quote, defendants have the  
15 burden of demonstrating their negative net worth, unquote.

16 MR. BROMBERG: Right.

17 THE COURT: Why are we talking about it,  
18 Mr. Bromberg?

19 MR. BROMBERG: Well, because it's going to become an  
20 issue down the line. In other words --

21 THE COURT: Well, okay.

22 MR. BROMBERG: We have already --

23 THE COURT: I'm really trying to be helpful here.  
24 Let me just say, preliminary to my next question, I'm very  
25 inclined to follow the general holding or thrust, if you will,

1 of Judge Schroeder's decision. Now, having said that, how,  
2 looking at Mr. Sayles, are you going to show that you have  
3 negative net worth? That is your position, isn't it?

4 MR. SAYLES: The position was the net worth was  
5 minimal.

6 THE COURT: I see. Where is that resounding  
7 affirmation of the financial health of the defendant stated in  
8 the record, Mr. Bromberg?

9 MR. SAYLES: Your Honor, if I may on that point, we  
10 intend to produce financials or financial reports from Cohen  
11 and Slamowitz's accountants attesting to their 2011 and 2012  
12 net worth which will summarize their balance sheets and all  
13 the information that was prepared in accordance as part of  
14 their tax returns for these years as well. That will reflect  
15 the net worth for Cohen and Slamowitz and it will show that it  
16 is nominal. These -- I don't have the --

17 THE COURT: Well, those would be -- so, you're happy  
18 to provide certified or audited balance sheets?

19 MR. SAYLES: I don't know if -- I've seen the copies.  
20 I don't believe it's an audited financial sheet. I don't --

21 THE COURT: Is it certified?

22 MR. SAYLES: I believe I could have it certified by  
23 an accountant. I don't want to speak out of turn, but I've  
24 discussed this with the appropriate parties and I believe I  
25 could get something, if not certified, an affidavit to the

1 effect saying they prepared this, which is what I provided.

2 THE COURT: And the certification would be that the  
3 document has been reviewed and is found to be a document  
4 prepared in accordance with the Court would accept as general  
5 accounting principals?

6 MR. SAYLES: Correct. I believe that and I don't  
7 want to put words in -- the report would be consistent with  
8 the case law, what the Godson case and similar cases require.  
9 Obviously, we want to produce that subject to the  
10 confidentiality order to be in place but once the class is  
11 certified, I agree that that's a relevant issue at the very  
12 least.

13 THE COURT: And if we directed your tax returns as  
14 Judge Schroeder did as well, that's not a problem either?

15 MR. SAYLES: Well, I believe the accountant's  
16 statement would be sufficient on that grounds, but I do --

17 THE COURT: I have Judge Schroeder's decision and  
18 obviously a magistrate judge just down the hall from another  
19 magistrate judge who has a published decision on it is very  
20 reluctant, shall we say, to go beyond the four corners of his  
21 learned colleague.

22 MR. SAYLES: I fully understand.

23 THE COURT: Put yourself in this Court's shoes. You  
24 can, of course, appeal to the district judge who can always  
25 say that no, Judge Foschio, you got it wrong, even though

1 the -- neither the plaintiff nor the defendant as far as I  
2 know in Judge Schroeder's case appealed to Judge Skretny.  
3 Interesting.

4 MR. SAYLES: Point well-taken, Your Honor and I'm  
5 familiar with that.

6 THE COURT: Thank you. Yes. So, that being -- so,  
7 I'm trying to really understand this issue. I've done a lot  
8 of homework on it, as you can begin to tell and I've thought  
9 about it. So, help me out here, Mr. Bromberg.

10 Why, if we direct what Judge Schroeder directed --  
11 maybe with some bells and whistles associated with it -- and  
12 you think that they're still hiding assets which undermine the  
13 credibility of the document, if not the certification, can you  
14 not serve them if discovery has not been completed with a  
15 contention interrogatory that solves your problem?

16 MR. BROMBERG: We could. The interesting thing about  
17 the decision and --

18 THE COURT: And you've obviously thought about this  
19 and I'm wondering whether this has been done elsewhere, in  
20 which the interrogatory was asked and having received these  
21 documents, particularly the balance sheet -- balance sheets,  
22 please state the facts, evidence and law upon which the  
23 defendant intends to or will rely on at trial to establish  
24 that its net worth is below zero or thereabouts. Wouldn't  
25 that solve the problem?

1 MR. BROMBERG: Might be a good approach, Your Honor  
2 and I know in the Godson decision --

3 THE COURT: And used before? Could it be -- you said  
4 it's a good approach. Well, obviously, you're an expert. You  
5 think you've struck on something here?

6 MR. BROMBERG: I'm looking for a way to deal with the  
7 situation --

8 THE COURT: So am I. So am I. It's an interesting  
9 point, but my job is to enforce discovery. I can't conduct  
10 satellite litigation, I don't think, unless you've got some  
11 case law that says that I can and should in this type of  
12 situation, call the preparers of these balance sheets to this  
13 Court under oath, put them into that witness box and let you  
14 examine them on the underlying authenticities of these  
15 documents.

16 MR. BROMBERG: The problem, Your Honor, right now is  
17 we have a certified class which is something we didn't have in  
18 Godson and then, we actually have a certified class. In  
19 addition, we don't have --

20 THE COURT: It's not a timing issue. Stick with the  
21 nub of what I'm getting at here. I don't see anything in  
22 Judge Schroeder's decision that allows me to grant your  
23 motion. I just said that to you at the outset. I'm trying to  
24 help you here. You knew right along that they have the  
25 burden. If they had the burden, then why do you need to take

1 the discovery?

2 MR. BROMBERG: Because right now, we're shooting in  
3 the dark. Right now, all we have is the response and --

4 THE COURT: Well, if you serve them with a request,  
5 once you get the document and ask them to provide the  
6 underlying documentation upon which this is based, you haven't  
7 even seen this balance sheet yet.

8 MR. BROMBERG: Are they going to be audited?

9 THE COURT: I don't know. I mean, I'm looking at  
10 Judge Schroeder's decision. It says audited. Waiting for a  
11 response from -- to talk about it momentarily. You can see  
12 that that word audited creates a potential problem but  
13 interestingly, there was no appeal of Judge Skretny's ruling.  
14 So, in that case, there must have been -- they must have been  
15 audited. I don't know. Maybe they're a public company so  
16 they were audited, maybe they weren't.

17 MR. BROMBERG: I mean, audited could be key here. I  
18 mean, if we've got someone saying -- coming in and saying  
19 we've have conducted an audit, these are good --

20 THE COURT: Yeah.

21 MR. BROMBERG: -- that changes the dynamic.

22 MR. SAYLES: Your Honor, if I may, there's an expense  
23 that's certainly associated with an audit process and if I  
24 follow Your Honor's previous comment, you're inclined to order  
25 the production of income tax returns as well. Those would be

1 documents filed with the IRS. It's attesting the same  
2 information that would be within the balance sheet.

3 THE COURT: That might be the statute.

4 MR. SAYLES: And I would -- I believe in Godson and  
5 again, there wasn't enough background available from the  
6 decision, but I know they're audited reports, but I didn't  
7 read the decision to say that the fact they were audited  
8 mattered. I just think that --

9 THE COURT: The statute also talks about, under  
10 1692(K) (b) (2), it says that in determining damages, the Court  
11 can consider the financial resources of a debt collector. So,  
12 I'm not sure I'm -- I mean, at a minimum, I'm thinking what  
13 Judge Schroeder has done is probably the law of the land, but  
14 I'm wondering, you know, what's your position about this audit  
15 and if -- once we hear about that, I'm wondering whether we  
16 can't also require or should require profit and loss  
17 statements, income statements, cash flow statements and a  
18 current trial balance for the current year?

19 MR. BROMBERG: I agree.

20 THE COURT: We've been down this path, not in an  
21 FDCPA case.

22 MR. SAYLES: I think if we reviewed the Godson case  
23 which cites to the Sanders matter --

24 THE COURT: Sanders doesn't give us any guidance on  
25 the discovery issue.

1 MR. SAYLES: Well, it did speak to the net worth  
2 issue.

3 THE COURT: Yes, it did, but we're beyond that. So,  
4 I mean -- and plus, I've got Judge Schroeder's decision  
5 construing Sanders. There's nothing in the two case cites  
6 that is contrary to what he did. In fact, they're both very  
7 consistent. The Malo (phonetic) case and the other case name  
8 escapes me, right? You read those cases?

9 MR. SAYLES: Yes and I could comment that the report  
10 that I've seen contains a --

11 THE COURT: How do I get around the audit  
12 requirement? We all know that there's a distinction between  
13 certified and audit.

14 MR. SAYLES: Well, I believe the -- to offer the  
15 initial production here, if Your Honor is ordering production  
16 of income tax returns along with the statement from the  
17 accountants to that effect, I believe the information out  
18 there is -- will be adequate to establish net worth. It's  
19 detailed. It's not a one-page statement saying --

20 THE COURT: Well, I'm not sure about that. It's not  
21 clear to me how a tax return establishes anything with respect  
22 to the financial condition of the taxpayer.

23 MR. SAYLES: It does reflect the document filed with  
24 the IRS subject to --

25 THE COURT: Well, but you're not focusing on my

1 question. What is there in a corporate tax return or a  
2 partnership return that directly is probative of the financial  
3 condition of the filer?

4 MR. SAYLES: Well, the balance sheets would --

5 THE COURT: They're not part of the return.

6 MR. SAYLES: The balance sheets prepared, the  
7 corporate balance sheets relied upon by the accountant to  
8 prepare the income tax return.

9 THE COURT: The what sheets?

10 MR. SAYLES: The corporate balance sheets -- and I'm  
11 using that term loosely -- the information compiled by the  
12 accountant, the balance sheets that they rely upon to prepare  
13 their information, the tax returns and this report that we're  
14 offering to provide, it effectively --

15 THE COURT: The balance sheets that helps them  
16 prepare a tax return.

17 MR. SAYLES: It show assets and liabilities.

18 THE COURT: Is that required in a partnership return?

19 MR. SAYLES: Well, no. The partnership return  
20 would --

21 THE COURT: The partnership return, like any return,  
22 demands information on revenue and deductions.

23 MR. SAYLES: Yes. It shows money that --

24 THE COURT: Income. Income is only one element.  
25 It's one small element in many circumstances of a balance

1 sheet.

2 MR. SAYLES: But we also have the case law guidance  
3 that the net worth is based on the balance sheet which would  
4 be the assets and the liability.

5 THE COURT: Yes, including cash, which may be  
6 minimal.

7 MR. SAYLES: Yes.

8 THE COURT: But unless they're bankrupt, then there  
9 must be other assets which exceed liabilities. As far as I  
10 know -- and you help me out here, I may be wrong -- does  
11 anybody know whether or not such information is reportable or  
12 is required to be reported on an LLC's tax return?

13 MR. SAYLES: As a matter of fact, it's an LLP, Your  
14 Honor.

15 THE COURT: LLP, same difference, limited  
16 partnership.

17 MR. SAYLES: I'm not aware. I haven't personally  
18 seen the income tax returns for the corresponding years. I  
19 have seen the accountant's report.

20 THE COURT: Well, do they have or do they not have  
21 audited balance sheets?

22 MR. SAYLES: I do not believe they have audited.  
23 What I have been provided is a financial sheet. I don't  
24 believe they --

25 THE COURT: What is it and who prepared it?

1 MR. SAYLES: Pardon?

2 THE COURT: What is it and who prepared it?

3 MR. SAYLES: It was a report prepared by their  
4 accountant, Markham and Associates which outlined their net  
5 worth for 2011. It identified assets, income, things like  
6 that, information and basically provides a picture of their --

7 THE COURT: I'm sensitive to the issue of audited  
8 because we know that many small businesses don't have audited  
9 financials. This doesn't sound like an -- what is their  
10 annual revenue?

11 MR. SAYLES: I don't know that off the top of my  
12 head, Your Honor.

13 THE COURT: Did you do a -- is there a Dun and  
14 Bradstreet available for C&S, Mr. Bromberg?

15 MR. BROMBERG: I haven't tried running a D&B on them,  
16 Your Honor. There's a privately-held company.

17 THE COURT: Well, that doesn't mean anything. That's  
18 what D&B is for. That's exactly what you use D&B for,  
19 otherwise you go to the SEC and look up the case.

20 MR. BROMBERG: Good point. I haven't tried running a  
21 D&B on them.

22 MR. SAYLES: Your Honor, I would suggest as an  
23 initial process, start with the information that was ordered  
24 in Godson and I believe it's adequate. I believe it's  
25 comprehensive.

1 THE COURT: Well, that requires you to file -- to  
2 serve audited balance sheets.

3 MR. SAYLES: Well, I guess under that caveat --

4 THE COURT: And you're now on the record as saying  
5 just order what Godson --

6 MR. SAYLES: Well, no, Your Honor. I understand  
7 Godson to require that information, but I think the audit  
8 aspect was incidental.

9 THE COURT: Well, you talked to Judge Schroeder about  
10 that?

11 MR. SAYLES: I didn't.

12 THE COURT: Well, if you know Judge Schroeder, he  
13 doesn't order incidental information.

14 MR. SAYLES: Well, I don't mean his statement was  
15 incidental. What was presented to him were financials that  
16 happened to be audited.

17 THE COURT: No, I don't think anything was presented  
18 to him. I think that is what was at issue. He was asked to  
19 allow for production. Where is that decision? Oh, I see your  
20 point. The defendant agreed to reproduce a copy -- agreed to  
21 produce a company of its audited balance sheets subject to a  
22 protective order. Why was there a motion in front of him?  
23 Oh, I see, because the plaintiff wanted more, apparently.

24 MR. SAYLES: Your Honor, incidentally, I don't have  
25 the specific case, but the documents I'm speaking about have

1 been accepted in the Eastern District of New York case subject  
2 to a confidentiality order on behalf of Cohen and Slamowitz as  
3 to their net worth. I don't have that matter before me, but I  
4 can't tell you they have been submitted in other litigations.

5 THE COURT: So, you're -- what you mean by so -- so,  
6 this puts some meat on the bones here about the incidental  
7 aspect of Judge -- what you're really saying is that he didn't  
8 reach the merits of the question of whether audited was  
9 required because of the defendant's proffer?

10 MR. SAYLES: They haven't -- they were already in  
11 existence. It wasn't the issue of whether they had to --

12 THE COURT: All right. Well, that's good enough. I  
13 think so. So, what authority do you have that they have to be  
14 audited under the FDCPA?

15 MR. BROMBERG: Well, it would just be -- well, the  
16 leading case on the entire issue is the 7th Circuit case of  
17 Sanders v. Jackson which says that net worth is book value net  
18 worth --

19 THE COURT: Not market value.

20 MR. BROMBERG: -- Not market value. Now, the  
21 question is what is the book value.

22 THE COURT: That's excluding good will.

23 MR. BROMBERG: Well, actually, that's a frequent  
24 misreading of Sanders v. Jackson.

25 THE COURT: Well, I don't know. I've read it a

1 couple times. I couldn't see any way around it.

2 MR. BROMBERG: Now, there's some loose language in  
3 there and this is entirely aside --

4 THE COURT: I know, I know. Go ahead. Make your  
5 point. We have to move on.

6 MR. BROMBERG: Okay, okay. My point though is there,  
7 they actually had books and I don't think they indicated one  
8 way or another whether they were audited. I'd have to go back  
9 and look. I'd have to go back and double check. I haven't  
10 read Sanders v. Jackson in a couple months, but the  
11 question -- there is a key question here if all we're getting  
12 is something coming from their accountant, that is, by its  
13 nature, something that's not -- that hasn't been examined by a  
14 third party.

15 It's been examined by a party that's been hired by  
16 and works frequently with the defendant and there's no clarity  
17 on what's actually there. Unless we, ourselves, can examine  
18 the underlying documents, we have no way of relying on what's  
19 been presented to us by their own accountants.

20 THE COURT: What case says that you're entitled to  
21 more than what Judge Schroeder provided?

22 MR. BROMBERG: Well, Judge Schroeder said audited.

23 THE COURT: Well, no. I mean, you're saying that if  
24 they were audited, then you wouldn't have made all these  
25 document requests and interrogatory demands?

1 MR. BROMBERG: If they were audited, we'd be hard-  
2 pressed to go far beyond maybe asking for say, three years of  
3 tax returns with schedules. I think if they produced audited  
4 tax returns, it makes it very difficult to argue against the  
5 book value net worth as represented in the audited tax  
6 returns. I had this come up on a case recently where the  
7 defendants produced audited returns and we basically decided  
8 we weren't going to fight what was on the audited returns.  
9 You're not going to -- you know --

10 THE COURT: Well, you can see from the Court's point  
11 of view that we, you know -- your discovery requests do  
12 challenge the notion of creating satellite litigation in which  
13 you're attempting to second guess, for example, the tax  
14 returns, which was the issues in the Malo (phonetic), case in  
15 the Eastern District.

16 MR. SAYLES: Your Honor, if I may add, in Godson,  
17 Judge Schroeder cites to Miller vs. Abrams, Eastern District  
18 of New York case rejecting discovery demands effectively  
19 seeking to audit defendant's tax returns. What Mr. Bromberg  
20 just explained, he's effectively seeking to perform his own  
21 audit of their returns. So, we've got an Eastern District  
22 case cited by --

23 THE COURT: Well, that's it. There's more than an  
24 echo of concern among judicial officers who have confronted  
25 the issue about opening the door into collateral litigation

1 but I -- and so, that's what made me ask the question of who  
2 ultimately bears the burden? And you know, the question I  
3 suppose is, at trial, if they bear the burden, they come in  
4 with this in-house accountant or maybe outside accountant who  
5 says, I prepared these returns in the course of ordinarily,  
6 you know, general, accepted accounting principals and explains  
7 to the jury what those are and how he went or she went about  
8 it and then, you cross-examine.

9 Your point is that unless you get discovery, you  
10 aren't in a position to cross-examine perhaps and undermine  
11 their effort to meet their burden?

12 MR. BROMBERG: Well, yes. And there's another  
13 problem here which is that --

14 THE COURT: What about, again, the idea of first  
15 getting the documents, either in audited or unaudited -- well,  
16 you just said if they're audited you don't need to do it, but  
17 even if they're unaudited, does that follow with contention  
18 interrogatory and then depose the accountant?

19 MR. BROMBERG: Well, I think it would take more than  
20 a contention interrogatory. We may have to see the underlying  
21 documents because the problem is, their responses to the  
22 discovery demands are really out there, Your Honor and we've  
23 got here, notwithstanding this and other objections, defendant  
24 states upon information and belief that its net worth is less  
25 than \$1,000 and defendant's calculation is based on the

1 following formula: Assets minus liabilities equals equity net  
2 worth. That was response to Interrogatory Number 8. We're  
3 talking about one of the largest debt collection law firms in  
4 the state.

5 THE COURT: That's why I asked you about the Dun and  
6 Bradstreet.

7 MR. BROMBERG: There's other places where they -- I'd  
8 have to look up -- hold on. Where is it? There's one in here  
9 where they actually say they have no assets.

10 THE COURT: Have you -- one of these cases referred  
11 to, I think the one, I just cited to you, this Miller case,  
12 Miller vs. McCollough, Eastern District of Illinois --  
13 Northern District of Illinois, for the record 198 F.R.D. 503  
14 2001 case in which Judge Bucklo referred to the relevance of  
15 the resources of the debt collector as statutorily relevant to  
16 the question of what the damages should be.

17 And she points out that the defendant's own  
18 Martindale-Hubbell listing, the McCollough Law Firm described  
19 itself as, quote, the premier mortgage banking firm in the  
20 State of New York, end quote. Even allowances -- making  
21 allowances for self-promotion, this is not a mom-and-pop  
22 business. 9,000 people were affected by their misconduct. I  
23 mean, my point is that, aren't there -- isn't there  
24 publically-available information about C&S that is going to  
25 put the credibility of the assertion that they have zero net

1     worth, you know, at some risk in front of a jury?

2             MR. BROMBERG:   It gets better.   We've got here,  
3     identify each asset owned by C&S and/or Midland.   That's  
4     Interrogatory Number 20.   We have, as a response, defendant  
5     has no assets.   Defendant has no knowledge of the assets of  
6     co-defendants.   They've got offices out in Suffolk County.  
7     Someone owns the offices.   Someone has some relation to Cohen  
8     and Slamowitz.   I mean --

9             THE COURT:   Why do you say that?   Isn't there such a  
10    thing as leases?

11            MR. BROMBERG:   Okay.   Well, let's see copies of the  
12    leases, Your Honor.   We also know that they have --

13            THE COURT:   Or ask them if they, you know, if their  
14    office is under lease.   Did you ask?   Is that one of your  
15    questions?

16            MR. BROMBERG:   Yes.   We asked about leases, we asked  
17    about assets, we asked about real estate owned, we asked  
18    about -- and every response has been, we've got nothing.   I  
19    mean, they have no assets?   They don't have a paperclip, Your  
20    Honor?   I've received papers directly from Cohen and  
21    Slamowitz.   They must have a paper clip.   They must have  
22    staples.   I have received stapled papers.   I mean, this is  
23    just outrageous.   So, that's the reason why we need audited.  
24    I mean, just the responses on the face are shocking.

25            THE COURT:   Contract providers, triple-net contract

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1 to identify their assets. If they owned a building, they  
2 would have reflected it in there. It's just a fishing  
3 expedition, respectfully. They're trying to gather  
4 information beyond what Cohen and Slamowitz has advised. I  
5 know the number is low, but, Your Honor, I've represented a  
6 number --

7 THE COURT: Well, if you're -- I mean, I -- I'm not,  
8 you know, I'm not asking you to answer this question, but if  
9 the situation were reversed, Mr. Sayles, how would you cross-  
10 examine the position your client is taking?

11 MR. SAYLES: I would want to see the financials that  
12 we've offered to produce. I don't see a need --

13 THE COURT: That's right, unaudited. And then, how  
14 are you going to cross-examine that accountant who prepared  
15 them when it comes trial or in a deposition for purposes of  
16 summary judgment? I guess this cap issue could be the  
17 candidate for summary judgment as well in theory.

18 MR. SAYLES: The numbers are supported, they'll go  
19 out -- they will be to the abilities of Mr. Bromberg  
20 whereas --

21 THE COURT: No, no, no. I mean, just imagine  
22 yourself in the opposite chair for a second as a (sic)  
23 opponent. How would you cross-examine that accountant unless  
24 you had the underlying facts, evidence, legal theories,  
25 accounting principals upon which he or she prepared those

1 unaudited financials?

2 MR. SAYLES: Well, the case law provides that the net  
3 worth determination needs to be subject to the GAAP.

4 THE COURT: Exactly.

5 MR. SAYLES: It's a standard that you can base your  
6 examination upon. It's a guidepost, just like you would do in  
7 any other case involving a standard of care. You base it on  
8 that and the information provided will detail what information  
9 is relied upon to reach those conclusions, but we read the  
10 case law now that shows what needs to be provided as a -- to  
11 establish net worth, we're willing to do that. What isn't in  
12 here is a basis to go beyond that. Right now, it's  
13 speculation as to ulterior motives.

14 THE COURT: Well, unfortunately, the case law says  
15 audited; the case law that I feel bound by.

16 MR. SAYLES: But as I've been discussing, I believe  
17 that was just in the -- the financials in Godson just happened  
18 to be audited. There's wasn't a dispute as to whether they  
19 had to be audited or not. That wasn't what was being  
20 presented at all.

21 THE COURT: Well, we can go one of two ways here.  
22 Either you provide audited statements and I'm going to apply  
23 Judge Schroeder's ruling or I'll let you provide unaudited  
24 statements and permit further discovery via the plaintiff,  
25 including contention interrogatories and depositions of the

1 accountant.

2 MR. SAYLES: Following production of the --

3 THE COURT: Yeah.

4 MR. SAYLES: -- returns and the statements?

5 THE COURT: And without prejudice to further  
6 discovery request if I'm satisfied that the production that is  
7 obtained without an audited statement is inadequate to the  
8 purpose of permitting a fair trial on the issue of negative  
9 net worth. I don't know what else to do.

10 MR. SAYLES: And my problem with an audited statement  
11 is that it creates a severe financial burden on Cohen. It's  
12 probably 25 to \$50,000 to audit the financials for a given  
13 year and we have a class that spans 2011 and 2012.

14 THE COURT: Is that the relevant time period,  
15 Mr. Bromberg?

16 MR. BROMBERG: The relevant time period --

17 THE COURT: For discovery purposes?

18 MR. BROMBERG: It's March 9th, 2011 through March  
19 9th, 2012 is the class period.

20 THE COURT: Is that the only period for which damages  
21 can be calculated?

22 MR. BROMBERG: The case law is not clear as to what  
23 period you fix the net worth for purposes of --

24 THE COURT: Under the statute, under however the  
25 statute reads relative to calculation -- oh, I see. Because

1 he's argued -- you agree this -- we're just talking statutory.  
2 So, it's only the violations that occur within the class  
3 period, is that it? Is that relevant for purposes of  
4 calculating?

5 MR. BROMBERG: Well, no, no, no. The -- okay. We've  
6 got --

7 THE COURT: I mean \$1,000 per plaintiff because only  
8 one letter was received.

9 MR. BROMBERG: It says \$1,000 in statutory damages --

10 THE COURT: Per member of the class?

11 MR. BROMBERG: -- per --

12 MR. LEGHORN: No, Your Honor, that's only the  
13 individual.

14 MR. BROMBERG: No, no, no. It's -- okay.

15 THE COURT: What is it?

16 MR. BROMBERG: It's \$1,000 to the class  
17 representative plus possibly some kind of an award for having  
18 stepped forward and represented the class, but it's \$1,000 in  
19 statutory damages to the class representative, plus any actual  
20 damages. With respect to the class, it's up to \$500,000 in  
21 statutory damages.

22 THE COURT: That's my point, but you start by doing  
23 the arithmetic of multiplying the number of persons in the  
24 class times \$1,000 don't you?

25 MR. BROMBERG: No. Actually, there's case law. I

1 think all the cases that have addressed this issue have said,  
2 for instance, where you've got \$500,000 in potential statutory  
3 damages, if there are only 20 class members, they can actually  
4 get more than \$1,000 each in statutory damages.

5 THE COURT: Really?

6 MR. BROMBERG: Well, actually, not 20 because then  
7 you run into the amount --

8 THE COURT: But the amount of damage is a function of  
9 multiplier. The multiplier is the number of class  
10 representatives to determine potential damages, correct?

11 MR. BROMBERG: Well, no. Actually, it's --

12 MR. LEGHORN: Your Honor, may I?

13 MR. BROMBERG: In an individual case to the class  
14 representative, the class representative can only recover --

15 THE COURT: I know that.

16 MR. BROMBERG: Yeah.

17 THE COURT: I'm talking about the class members.

18 MR. BROMBERG: The class members can take \$500,000  
19 divided by how many class members there are and the \$1,000 cap  
20 doesn't apply. If there are one or two --

21 THE COURT: So, in a class action, you're not  
22 multiplying, you're dividing?

23 MR. BROMBERG: Right.

24 THE COURT: Oh, I didn't know that.

25 MR. SAYLES: That's why it's a cap.

1 MR. BROMBERG: There's at least one case out of I  
2 believe the --

3 THE COURT: I thought it was the other way around,  
4 that you would multiply and then, you would find that it  
5 exceeds \$500,000 and you would limit it to 500,000 and then,  
6 you'd divide into 500,000.

7 MR. BROMBERG: If you happen to have fewer than 500  
8 class members, that they could actually, in theory, recover  
9 more than \$1,000 and I believe there was a case in the Eastern  
10 District of Pennsylvania where people received more than  
11 \$1,000 per class member. I don't recall the name of the case  
12 off the top of my head.

13 THE COURT: Okay.

14 MR. BROMBERG: Okay.

15 THE COURT: So, where are we?

16 MR. SAYLES: I believe Your Honor presented two  
17 options to me.

18 THE COURT: Well, I don't know what other options  
19 there are. Is there another option?

20 MR. SAYLES: I believe the option is to provide the  
21 information that Cohen and Slamowitz has right now and if  
22 there's future objections or issues that arise based on that,  
23 then we can address it. I understand Mr. Bromberg hasn't seen  
24 the information, so it's difficult to ask him to speak to  
25 their sufficiency or adequacy about having seen it, but I

1 would represent that to go further and impose additional  
2 requirements without having that information out there right  
3 now would be prejudicial to my client because --

4 THE COURT: So, if you're talking \$50,000 and Cohen  
5 and Slamowitz, the question is whether or not that expense to  
6 produce discoverable material is out of bounds under Rule 26.  
7 In other words, does the cost, i.e. burden to the requested  
8 party, does that outweigh the probative value under Rule 26?

9 As you know, there's a balancing test now the Court  
10 has to apply; outweigh the probative value to the plaintiff.  
11 If the probative value to the plaintiff is that, in theory,  
12 the recovery goes from \$0 per plaintiff or a matter of  
13 pennies, to -- how many plaintiffs do we have here again?

14 MR. BROMBERG: That's a good question.

15 THE COURT: Ballpark.

16 MR. BROMBERG: It's either 17,475 or 38,325. We're  
17 not clear at the moment.

18 THE COURT: Well, that's still a relatively small  
19 number.

20 MR. BROMBERG: True.

21 THE COURT: When divided into 500,000, but it's  
22 better than nothing and I'm not -- and I know the answer to  
23 this question is that no judge has opined on whether that's an  
24 appropriate expense to impose on the defendants with that type  
25 of potential maximized recovery for a plaintiff. Do you

1 follow me?

2 MR. SAYLES: Incidentally, Your Honor, the  
3 recovery --

4 THE COURT: In other words, \$50,000 -- I don't even  
5 know if he's right about that. It could be high, it could be  
6 low. I don't really know. I should probably get on the phone  
7 and call my accountant at a well-known local firm and ask what  
8 would, you know -- because we don't know what the revenue is.  
9 We don't, you know -- so, it's very inspective at this point.  
10 But imposing that burden on them for the potential  
11 maximization of damages, i.e., \$25 per plaintiff or  
12 thereabouts.

13 MR. SAYLES: Incidentally, Your Honor, the cap would  
14 be 1 percent of the net worth. Even -- and I don't -- I  
15 believe even if Cohen said --

16 THE COURT: Or the lesser of?

17 MR. SAYLES: Yeah.

18 THE COURT: Yeah. But, I mean, in theory, I'm just  
19 trying to gross it up here. In theory, the maximum recovery  
20 could be \$500,000.

21 MR. BROMBERG: Well, I mean, Your Honor, in theory,  
22 they could --

23 THE COURT: Or less. It could even ratchet down to  
24 be smaller number. I agree with you, Mr. Sayles, on that.

25 MR. SAYLES: Your Honor, presumably it would cost

1 less than 50,000 to photocopy the documents that we've asked  
2 for, turn them over, we go to our account and have them look  
3 at them.

4 THE COURT: Point made.

5 MR. SAYLES: But those are -- there's a breadth of  
6 information that there's some entitlement of confidentiality  
7 and privacy because especially where the defendants are sued  
8 for --

9 THE COURT: No, that's -- no, no, no. We have a  
10 confidential agreement. It's not an issue.

11 MR. SAYLES: But the case law that exists does not  
12 require more than production of the returns. I know Godson  
13 didn't have happen to involve a (sic) audited financial, but  
14 it wasn't the threshold. Nothing in that decision suggests  
15 that the audited nature of those financials --

16 (An off-the-record discussion was held.)

17 THE COURT: One of the cases is cited by Judge  
18 Schroeder, I forget which, I think it's Malo, it refers to  
19 financial documents. It doesn't actually say what Judge  
20 Schroeder says it says about tax returns. Oh, it says and  
21 financial report. Excuse me, he did get it right. Yes, he  
22 did. Of course he did. So, we don't know though, in that  
23 case, whether those documents were audited or not.

24 MR. BROMBERG: Actually, it was my case, Your Honor.

25 THE COURT: That's right. It was. I remember that.

1 MR. BROMBERG: It was Arrow Financial.

2 THE COURT: Remember I said I saw that? It's the  
3 same guy. He's all over the place.

4 MR. BROMBERG: It's the Arrow case. It was  
5 Magistrate Levy, Eastern District. It was a pretty major-  
6 sized firm. I can't remember whether the financials were  
7 audited or not. It was Arrow Financial which is one of the  
8 largest debt collectors in the country, which has since been  
9 acquired by Sallie Mae or Fanny Mae, Sallie Mae, right and now  
10 they're worth even more.

11 THE COURT: Yeah. We've got to move on. Here is my  
12 ruling for the day: We are going to abide by Judge  
13 Schroeder's ruling. We are going to grant the -- I'm going to  
14 call it the net worth discovered request. We are going to  
15 grant the requests, including the associated document requests  
16 by directing the defendant C&S, not Midland, C&S, to provide  
17 audited financial statements for the relevant years for the  
18 relevant period. Are you sure about this now, Mr. -- for  
19 purposes of discovery, Mr. Bromberg, one year only?

20 MR. BROMBERG: Well, the problem is that the case law  
21 is not clear on whether you determine the net worth as --

22 THE COURT: Will I be clearly erroneous if I required  
23 them to provide for a year prior to the relevant year and a  
24 year subsequent thereto, which would conclude 2013?

25 MR. BROMBERG: That's fine.

1 MR. SAYLES: The cost in that could be upwards of 150  
2 to \$200,000 if you're including three years.

3 THE COURT: Well, you don't know that.

4 MR. SAYLES: Well, we don't know that at all at this  
5 point.

6 THE COURT: And it might be substantially less. I  
7 mean, the way -- I'm not pointing the finger at anybody,  
8 Mr. Sayles, but in a way, the Court's being asked to try to  
9 nail jelly to the wall and it's just not fair and I've got to  
10 put some burden on the defendant here because in effect you're  
11 saying, you know, look, you know, take it or leave it, you  
12 know? Whatever we give you, that's it. You're not entitled  
13 to --

14 MR. SAYLES: I'm not saying that.

15 THE COURT: I'm not telling -- I'm not permitting  
16 them to do the auditing that you're resisting. I'm giving you  
17 the chance to do your own auditing by directing that you  
18 provide audited financial statements and tax returns,  
19 corporate partnership tax returns for the -- what is the year  
20 before again? I've got to get this right.

21 MR. BROMBERG: 2011 to 2012, Your Honor is the range  
22 of the class that's been served.

23 THE COURT: And the -- for purposes of discovery,  
24 2010 to 2011 on the back side and on the front side, 2012 to  
25 2013. I'm assuming their fiscal year is the calendar year.

1 MR. SAYLES: Your Honor, if that's the order, is  
2 there a possibility --

3 THE COURT: Just a second. Let me finish. So, we're  
4 going to order audited financials for those calendar years  
5 2010 to 2011, 2011-2012, 2012-2013 and we're going to require  
6 those to be financial -- excuse me, balance sheets, income  
7 statements, profit and loss statements, cash flow statements  
8 and current trial balance for the defendant's current fiscal  
9 year. That would be the first quarter of 2014.

10 MR. SAYLES: If I may, Your Honor, is there an out --  
11 given that ruling or that instruction, is there an option that  
12 would give Cohen and Slamowitz the option to produce the  
13 documents to plaintiff in lieu of its incurring that  
14 expensive --

15 THE COURT: The requested documents?

16 MR. SAYLES: Because I don't want to speak -- I don't  
17 know. It's a substantial sum that's been imposed on them.

18 THE COURT: Well, I mean --

19 MR. SAYLES: And Your Honor, I don't --

20 THE COURT: You know what my reaction to that is,  
21 Mr. Sayles? In your -- you've been practicing long enough and  
22 I'm sure Mr. Leghorn and the other lawyers are, this  
23 information is probably the information that a competent, in-  
24 house accountant or outside accountant would have at his or  
25 her fingertips if they were charged with the responsibility of

1 preparing a competently-prepared balance sheet only.

2 MR. SAYLES: This doesn't have to be audited by an  
3 independent third party?

4 THE COURT: You figure it out. I'm using the word  
5 audited as commonly referred to and if there's a way to do it  
6 in and a way that's satisfactory to the plaintiff, you work it  
7 out with them and that's it. If there's an alternative you  
8 want to explore --

9 MR. SAYLES: That's as to the Cohen and Slamowitz LLP  
10 only, correct?

11 THE COURT: Yes. Okay? Did you get that, Sandra?  
12 That's it. That disposes of a number of requests,  
13 Mr. Bromberg?

14 MR. BROMBERG: Yes, many.

15 MR. SAYLES: Your Honor, was there a timeframe set on  
16 that?

17 THE COURT: Not yet. Timeframe -- I want to get the  
18 numbers down here for the record.

19 MR. BROMBERG: That covers Request for Production 19  
20 through 49 with the exception of 24 and 25.

21 THE CLERK: What were those, 19 through?

22 MR. BROMBERG: 19 through 49, but not 24 and 25.

23 THE COURT: And interrogatories?

24 MR. BROMBERG: Interrogatories, no.

25 THE COURT: Well, yes, 19 to 24 interrogatories.

1 MR. BROMBERG: Oh, excuse me. Sorry, 19 to 24. I'm  
2 sorry, Your Honor, you're right.

3 THE COURT: Thank you. All right. Anybody need a  
4 break?

5 MR. SAYLES: And just if I may, I believe --

6 THE COURT: Oh, the timeframe. Ninety days,  
7 Mr. Bromberg?

8 MR. BROMBERG: That's fine, Your Honor.

9 THE COURT: Ninety days, Mr. Sayles?

10 MR. SAYLES: I don't want to speak out of turn. I  
11 don't know what timeframe the accountant would require. I  
12 imagine at least the month of April through the next two weeks  
13 is shot for the accountant, but 90 days would be time to at  
14 least inquire and urge that. Although, Judge, I believe the  
15 requests that were presented here were documents that they  
16 relied upon in forming their net worth value that they  
17 reflected.

18 I mean, now we've got three years. Cohen and  
19 Slamowitz have got audited financials for three years,  
20 including a year that's not even within the class that's been  
21 certified here.

22 THE COURT: Why am I saying that? Because I'm  
23 looking at it from a discovery point of view which is to test  
24 the -- well, you know, Mr. Bromberg, now that I think about  
25 it, maybe that's more than you really need, now that I think

1 about it on reflection. If they're audited, why wouldn't that  
2 one year be good enough?

3 MR. BROMBERG: Well, the only issue really becomes  
4 that --

5 THE COURT: I know I'm asking you a difficult  
6 question despite your vast experience in this, but we're  
7 dealing in uncharted waters here.

8 MR. BROMBERG: Okay. The problem is, it's not clear  
9 from the case law what point you measure the net worth for  
10 purposes of the cap; whether it's the date of the violations  
11 or the date that the case actually goes to trial.

12 THE COURT: I was thinking more a matter of the trier  
13 of fact trying to figure out what the right number is and it  
14 could be that an expert accountant would say, Judge, you  
15 really need a time frame within which to make a judgment based  
16 on an opinion that somebody would give after looking at these  
17 things.

18 An opinion might be that it was just the one year,  
19 that's good enough, but an opinion from a forensic accountant  
20 might be, you know, we needed to have the year prior and the  
21 year following in order to advise the trier of fact what the  
22 correct number really is. I mean, the fact that they claim it  
23 to be done with -- under general accounting principals, would  
24 that prevent you from challenging that? I don't think so.  
25 It's going to be the trier of the fact will decide. So, just

1 as we do in other discovery context, typically we ask for some  
2 timeframe in order to help us achieve some reasonable accuracy  
3 as to what the underlying fact really is. So, that's why I am  
4 tempted to -- intending to do what I've just already said I  
5 think we should do.

6 MR. BROMBERG: No, I think that makes sense. I think  
7 that's -- I hadn't thought of it that way. I was thinking  
8 more of a legal question of when you fixed that.

9 THE COURT: Well, it's a discovery dispute. I'm not  
10 attempting to fix liability here.

11 MR. BROMBERG: No, I think that makes sense that you  
12 need one year before and one year after to make sure that what  
13 you're seeing --

14 THE COURT: Whatever the number is for the relevant  
15 period is the correct number.

16 MR. BROMBERG: Right.

17 THE COURT: That's my thinking, Mr. Sayles. If you  
18 want to come up with something else by some agreement with  
19 Mr. Bromberg after the proceeding is over with, you go right  
20 ahead.

21 MR. SAYLES: Well, no more in any of the other cases  
22 on this point have I seen any discussion of looking at years  
23 in a bracket. It was net worth for financial records for the  
24 given year. I just -- it's been explained unduly and I think  
25 it's overly prejudicial and burdensome to my client.



**MICHAEL HALLMARK, on behalf of himself and all others similarly situated, Plaintiff,**  
**v.**  
**COHEN & SLAMOWITZ, MIDLAND FUNDING LLC, Defendants.**  
**11-CV-842S(F)**  
**UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK**  
**October 8, 2014**

**DECISION and ORDER**

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**JURISDICTION**

This action was referred to the undersigned by Hon. William M. Skretny on November 10, 2011 for all non-dispositive pretrial matters (Doc. No. 9). It is presently

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before the court on Defendant Cohen & Slamowitz, LLP's motion for reconsideration and a protective order, filed April 30, 2014 (Doc. No. 190) ("Defendant's motion").

**BACKGROUND and FACTS<sup>1</sup>**

This class action asserting Defendants' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), was initiated on July 2, 2012 by the filing of Plaintiff's Amended Complaint (Doc. No. 28). Specifically, Plaintiff alleges C&S violated FDCPA Section 1692e(2)(A) by demanding, in a letter to Plaintiff, payment of a \$140 court filing fee in connection with Buffalo City

Court collection actions instituted against Plaintiff without actually having paid such filing fee at the time C&S's demand letter was sent, between March 2011 and March 2012, to approximately 38,000 debtors residing in New York State, for payment of the debt and such filing fees. Plaintiff also alleges Defendants violated FDCPA Sections 1692e, 1692e(2)(A), e(5), e(10), (f) and (f)(1) by making deceptive and misleading demands. Plaintiff's class action was certified by Chief District Judge Skretny on September 16, 2013 (Doc. No. 110). By order dated January 8, 2014, Judge Skretny denied Defendants' motion to decertify the class (Doc. No. 177).

On April 12, 2013, Plaintiff moved to compel responses to Plaintiff's First Set of Interrogatories, Document Requests and Requests to Admit (Doc. Nos. 71) ("Plaintiff's motion to compel"). Plaintiff's discovery requests<sup>2</sup> were directed to C&S's net worth specifically requesting C&S financial information such as: (1) C&S's real property

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ownership (Int. No. 19), (2) financial assets including bank deposits, investment accounts, retirement accounts, securities, vehicles, furnishings, fixtures, equipment, computers and accounts receivable (Int. No. 20), (3) debt whether individually or jointly owned with co-Defendant Midland (Int. No. 22), (4) C&S's tax returns and related schedules for 2007 through 2013 (Doc. Request No. 20), (5) accounting statements regarding C&S's assets and liabilities for 2007 to 2013 (Doc. Request No. 21), (6) applications for credit and related financial statements (Doc. Request No. 22), (7) asset and financial statements provided to investors, creditors, auditors, accountants, and agencies (Doc. Request No. 23), (8) any litigation documents reflecting C&S's net worth (Doc. Request No. 26), (9) all relevant corporate documents such as shareholder and buy-sell agreements (Doc. Request No. 28), (10) documents describing C&S's accounts receivables and payables, budget forecasts and hourly rates (Doc. Request Nos. 30-31), (11) annual financial statements and tax returns for each segment of C&S's business (Doc. Request No. 34), (12) discretionary expenses (Doc. Request No. 35), (13) the fair market value of any intangible assets (Doc. Request No. 36), work in process, inventory, and any off-the-books assets or liabilities (Doc. Request Nos. 37-40), (14) compensation and employee benefit plans, balance sheets, loan applications, income and profit and loss statements for the past three years, bank statements and mortgage, pledge or security agreements (Doc. Request Nos. 41-42, 45-49) and (15) C&S's transfer of any identified assets, the circumstances regarding such transfer and any consideration received (Int. No. 24). Defendant's response included the general objection that Plaintiff's requests were (1) premature given that at the time no class had then been certified and (2) irrelevant as C&S's net worth was less than \$1,000 because

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C&S had no retained earnings or real property (C&S Answer to Plaintiff's Int. No. 30, Doc. No. 73-1 at 17). Plaintiff asserts Plaintiff is entitled to discovery of such requested information because in an FDCPA class action plaintiffs' recovery is limited by 15 U.S.C. § 1692(a)(2)(B) to the lesser of \$500,000 or 1% of a defendant's net worth and Plaintiff must be prepared to challenge Defendant's assertion of "low net worth." Plaintiff's Memorandum of Law, Doc. No. 72, at 3 and n. 4 (citing cases).

Defendants' motion is supported by Defendant Cohen & Slamowitz, LLP's Memorandum Of Law In Support Of Motion For Reconsideration Or For A Protective Order (Doc. No. 190-1) ("C&S's Memorandum of Law"), Affidavit Of Gregory Giugliano, CPA (Doc. No. 190-2) ("Giugliano Affidavit") and Declaration Of Andrew C. Sayles, Esq. In Support Of Motion For Reconsideration And For Protective Order (Doc. No. 190-3) ("Sayles Declaration I"). In further support of Defendant's motion, on May 9, 2014, C&S submitted, for filing under seal, the Declaration Of Andrew C. Sayles, Esq.,

submitting financial information consisting of C&S's financial statement for 2011-2012 ("Sayles Declaration II") in further support of Defendant's motion, attaching Exhibits A - D ("Sayles Declaration II Exh(s). \_\_\_\_") ("Defendant's Sealing Request"). By order of the court, on July 23, 2014 (Doc. No. 217), this document was filed under seal (Doc. No. 218).

On May 27, 2014, Plaintiff filed, in redacted form, Plaintiff's Memorandum of Law in Opposition to Defendant Cohen & Slamowitz, LLP's Motion for Reconsideration or, in the Alternative, for a Protective Order (Doc. No. 201) ("Plaintiff's Memorandum") (Plaintiffs also submitted to the court an unredacted form of Plaintiff's Memorandum) along with the Declaration of Plaintiff's Attorney Brian L. Bromberg in Opposition to

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Cohen & Slamowitz, LLP's Motion for Reconsideration or, in the Alternative, for a Protective Order (Doc. No. 202) ("Bromberg Declaration I") together with exhibits A - C (Doc. No. 202-1-3 ("Bromberg Declaration I Exh(s). \_\_\_\_"). By papers, also filed May 27, 2014, Plaintiffs moved to file under seal the unredacted version of Plaintiff's Memorandum and Bromberg Declaration Exhs. B & C (Doc. No. 203) ("Plaintiff's Motion to Seal"). Plaintiff's Motion to Seal requests that the aforementioned Bromberg Declaration Exhibits B & C be filed under seal because C&S has submitted such documents, marked Confidential, to the court in support of Defendant's motion and such designation requires that documents be filed under seal when submitted to the court in accordance with the Stipulation of Confidentiality ¶ 10 (Doc. No. 193) and Plaintiff's opposition to Defendant's motion requires reference to such documents. Plaintiff's Motion to Seal at 2. Plaintiff's motion was granted on July 23, 2013 (Doc. No. 219). An unredacted form of the Bromberg Declaration and Bromberg Declaration Exhs. A - C) filed July 23, 2014 (Doc. No. 221) was submitted by Plaintiff.

On June 2, 2014, Defendant C&S filed a Reply Memorandum Of Law In Further Support Of Defendant Cohen & Slamowitz, LLP's Motion For Reconsideration Or For A Protective Order (Doc. No. 207) ("Defendant's Reply Memorandum").

On July 23, 2014, Plaintiff filed Plaintiff's Memorandum of Law in Opposition to Defendant Cohen & Slamowitz, LLP's Motion for Reconsideration or, in the Alternative, for a Protective Order (Doc. No. 220) ("Plaintiff's Memorandum"), along with the Declaration of Plaintiff's Attorney Brian L. Bromberg in Opposition to Cohen & Slamowitz, LLP's Motion for Reconsideration or, In the Alternative for a Protective Order (Doc. No. 221) ("Bromberg Declaration II") attaching Exhibits A - C (Bromberg

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Declaration II Exhs. A-C"). On August 6, 2014, Plaintiff filed Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant Cohen & Slamowitz, LLP's Motion for Reconsideration or, In the Alternative, for a Protective Order (Doc. No. 224) ("Plaintiff's Supplemental Memorandum").

On August 18, 2014, Defendant C&S filed Defendant Cohen & Slamowitz, LLP's Supplemental Response In Further Support Of Its Motion For Reconsideration Or For A Protective Order (Doc. No. 226) ("Defendant's Supplemental Response") together with the Supplemental Declaration Of Andrew C. Sayles, Esq., In Further Support Of Motion For Reconsideration And Protective Order (Doc. No. 226-1) ("Sayles Supplemental Declaration") attaching exhibits A&B ("Sayles Supplemental Declaration Exhs. A&B").

On October 1, 2014, Defendant filed a Notice of Supplemental Authority, (Doc. No. 229) ("Supplemental Authority"), attaching a copy of a recent Decision and Order in *Godson v. Eltman, Eltman & Cooper, P.C., et al.*, 11-CV-764S(Sr) (Doc. No. 229-1) ("*Godson* September 15, 2014 D&O").

## DISCUSSION

Defendant Cohen & Slamowitz, LLC ("C&S" or "Defendant") moves for reconsideration of the court's decision, following oral argument conducted April 2, 2014 (Doc. No. 184), on Plaintiff's motion, filed April 12, 2013, to compel information relating to Defendant's net worth (Doc. No. 71). At that hearing, the court, without specifically ruling on Plaintiff's motion to compel, directed, based on a recent decision by another magistrate judge of this court, Hon. H. Kenneth Schroeder, involving a similar discovery dispute, *Godson v. Eltman, Eltman & Cooper, P.C.*, 2013 WL 4832715 (W.D.N.Y. Sept.

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11, 2013) ("*Godson*"), that Defendant should, in satisfaction of Plaintiff's discovery requests, produce audited financial statements and copies of Defendant's tax returns for Defendant's 2011, 2012 and 2013 tax years, Declaration of Brian L. Bromberg, Doc. No. 221, Exh. A (transcript of oral argument conducted April 2, 2014) at 78-79 ("the April 2, 2014 ruling"). Defendant argues that in directing Defendant produce audited financial statements, instead of the underlying financial information which Defendant's balance sheets were based, in response to Plaintiff's discovery requests, the court misread *Godson*. Specifically, according to Defendant, *Godson* did not hold that a FDCPA class action defendant, like C&S, is required to produce audited financials on the issue of damages which is capped by statute at the lesser of \$500,000 or 1 % of a defendant's net worth by the FDCPA, *see* 15 U.S.C. § 1692k(a)(2)(B) ("§1692K(a)(2)(B)"). C&S's contention is predicated on its assertion that, because the defendant in *Godson* had provided audited financials the court would not have required defendant to produce audited financials had not the audited financials been created by defendant and available for production, and, as such, the court's direction to defendant to produce its audited financial was merely "incidental" to Judge Schroeder's primary determination that plaintiff was not entitled to defendant's financial records, other than defendant's previously prepared audited financials and its tax returns. Defendant's Memorandum (Doc. No. 190-1) at 10. *See Godson*, 2013 WL 4832715, at \*3. Defendant also claims Judge Schroeder cited no authority "for requiring production of audited financial records," in cases like this one, Defendant's Memorandum at 10. Defendant further argues that this court erred in requiring audited financials for Defendant's fiscal years ending 2011, 2012 and 2013, referencing the transcript of the oral argument, Bromberg

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Declaration, Exh. A, at 80, where the court stated that audited financial information for the Defendant's fiscal years prior to and following 2012, during which the alleged FDCPA violations occurred, would be relevant to an accurate factual determination of C&S's net worth at trial, with the probable aid of expert testimony, of Defendant's net worth for 2012. *Id.* at 83-84.

### **1. Defendant's Motion for Reconsideration.**

The standard for granting a motion for reconsideration under Fed.R.Civ.P. 60(b) is strict. *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration "will generally be denied unless the moving party can point to controlling decisions or important facts that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Id.* Nor is a motion for reconsideration intended to be a "second bite at the apple" for a party dissatisfied with the court's ruling by "relitigating old issues, presenting the case under new theories,

[or] securing a rehearing on the merits . . . ." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998). Generally, reconsideration is justified only where there exists "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (citing 18 C. Wright, A Miller & E. Cooper, FEDERAL PRACTICE & PROCEDURE § 4478 at 790).

Here, Defendant seeks reconsideration of the court's decision, following oral argument on April 2, 2014, directing Defendant produce audited financial statements, particularly C&S's balance sheet for its 2011, 2012 and 2013 fiscal years. In reaching

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its determination, the court was guided by *Godson v. Eltman, Eltman & Cooper, P.C.*, 2013 WL 4832715 (W.D.N.Y. Sept. 11, 2013) ("*Godson*"), a recent decision on a similar discovery dispute in which the court directed defendants to produce their audited financials. However, upon further review, it appears that in *Godson* such audited financials had been previously prepared for defendants by defendants' outside accountants, and thus it was not the case that the court had directed production of audited financials that did not previously exist in response to plaintiff's discovery requests. More specifically, in a recent ruling, dated September 15, 2014, in the *Godson* litigation, the court directed production by co-defendant LVNV of "its audited financial statements," *Godson* September 15, 2014 D&O, Doc. No. 229-1, at 9 (underlining added), from which it is inferable that such audited financials already existed.<sup>3</sup>

It is basic that in responding to a document production request, pursuant to Fed.R.Civ.P. 34(a) ("Rule 34(a)"), "a party is not required to create documents meeting the document requests, only to produce documents already in existence." Baicker-McKee Janssen Corr, FEDERAL CIVIL RULES HANDBOOK, Thompson Reuters (2014) at 889) citing caselaw. *See also Breedlove v. Mandell*, 2008 WL 596864, at \*2 (W.D.N.Y. Feb. 29, 2008) (denying motion to compel based on requested party's representation that it had no record of requested document, and in the absence of any reason to doubt such representation, because the "[c]ourt cannot compel production of what does not exist." (quoting *American Banana Co., Inc. v. Republic National Bank of New York, N.A.*, 2000 WL 521341, at \*3 (S.D.N.Y. May 1, 2000))). Thus, in the instant case, while

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this court sought to dispose of Plaintiff's motion to compel consistent with *Godson*, by directing C&S to produce audited financials which do not presently exist, to do so would be contrary to the general rule that defendants are only required to produce previously prepared audited financials. Therefore, the court's recent rulings in *Godson* provide clarification of the prior *Godson* decision regarding discovery of defendant's financial documents, consistent with this general rule. Although production by C&S of audited financials, the 'gold standard' of accounting practice, could, if accepted by Plaintiff in lieu of Plaintiff's discovery requests, obviate the need for discovery of the C&S's underlying financial records relevant to C&S's net worth which remain the subject of Plaintiff's motion to compel, nevertheless, as discussed, *supra*, the court is required to avoid directing discovery beyond that permitted by Rule 34(a).

The question remains, however, whether Plaintiff's motion to compel, left unresolved by the court's April 2, 2014 ruling, seeking such underlying information should be granted in light of C&S's proffer of its financial statements that have been reviewed, but not audited, by C&S's outside accountant. *See* Sayles Declaration Exhs. A-D (Independent Accountant Review Report for C&S's Unconsolidated and Consolidated Financial Statements for Fiscal Years ending December 31, 2011 and 2012, respectively) ("Reviewed Statements"). While such Reviewed Statements are certainly helpful in providing a definitive answer to the question of C&S's net worth, they are not dispositive, and, for that matter, neither would

audited statements. Significantly, Defendant cites to no authority holding that the production of such Reviewed Statements forecloses further discovery on the issue of a defendant's net worth and the court's research reveals none. On the other hand, to illustrate the need for further fact

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discovery in this case directed to whether the Reviewed Statements accurately describe C&S's net worth, Plaintiff questions whether C&S has fairly stated the value of its Portfolio Investments, the underlying defaulted debt instruments acquired by C&S as a major asset of its collections business which C&S attempts to collect thereby producing significant revenue to C&S, which C&S stated at cost on the Reviewed Statements, as a significant C&S asset, or whether the value of these assets are substantially understated by C&S. *See* Plaintiff's Memorandum at 17. Additionally, in FDCA class action cases seeking damages pursuant to § 1692K(a)(2)(B) courts permit discovery of a defendant's underlying financial data relevant to the issue of defendant's net worth. *See Anchondo v. Anderson, Crenshaw & Associates, L.L.C.*, 256 F.R.D. 661, 669 (D.N.M. 2009) (court "will ultimately determine how to calculate net worth and whether any documents produced in response to [plaintiff's] request are admissible"); *Miller v. Abrams, Fensterman, et al.*, 2011 WL 6105033, at \*1 ("Plaintiff need not accept defendant's interpretation of its financial data . . . but is entitled . . . to examine the data underlying defendant's statement of net worth." (quoting *Mailloux v. Arrow Financial Services, L.L.C.*, 2002 WL 246771, at \*1 (E.D.N.Y. Feb. 21, 2002))). In *Miller*, the court permitted deposition questions directed to certain deductions on defendant's tax returns challenged by plaintiff as improperly understating defendant's net worth. *Miller*, 2011 WL 6105033, at \*1. In *Mailloux*, the court enforced plaintiff's discovery requests "related to defendant's net worth." *Mailloux*, 2002 WL 246771, at \*1. Thus, production of the &S's Reviewed Statements, although relevant to the question of C&S's net worth, does not foreclose Plaintiff's discovery of C&S's financial information upon which such Reviewed Statements were based. Accordingly, Defendant's motion for reconsideration

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should be GRANTED and, *sua sponte*, the court finds Plaintiff's motion to compel, should also be GRANTED.

## **2. Defendant's Motion for a Protective Order.**

Defendant's motion for a protective order is predicated on Defendant's contention that the cost of producing audited financials is disproportionate to the value of the issue of Plaintiff's damages. Defendant's Memorandum at 10. Specifically, Defendants argue that, based on Defendant's Reviewed Statements, the costs of producing audited financials for Defendant's 2010, 2011, and 2012 fiscal years would be in the range of \$100,000 to \$150,000, see Giugliano Affidavit ¶ 6, vastly exceeding Plaintiff's potential recovery which Defendant asserts would be substantially less. Defendant's Memorandum at 14. However, as the court, upon reconsideration, will vacate its April 2, 2014 ruling directing Defendant to provide audited financials responsive to Plaintiff's motion to compel, the court finds Defendant's alternative motion for a protective order is moot and, as such, is DISMISSED.

## **CONCLUSION**

Based on the foregoing, Defendant's motion for reconsideration (Doc. No. 190) is GRANTED; the court's order that C&S produce audited financials for three fiscal years (Doc. No. 184) is VACATED; Defendant's motion for a protective order is DISMISSED as moot; Plaintiff's motion to compel (Doc. No. 71) is GRANTED.

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SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO

UNITED STATES MAGISTRATE JUDGE

Dated: October 8, 2014

Buffalo, New York

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Footnotes:

<sup>1</sup> Taken from the papers and pleadings filed in this action.

<sup>2</sup> Each of Plaintiff's discovery requests is referenced in Defendant C&S's responses to Plaintiff's discovery requests, filed as Doc. No. 73-1.

<sup>3</sup> Although there is no explicit statement denying the existence of audited financials for C&S, taken as a whole, the record indicates this to be the fact.

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